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State responsibility

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments

General remarks

Poland

The Ministry of Foreign Affairs of the Republic of Poland expresses its highest satisfaction at the termination of the ILC codification work on the topic of State responsibility. It wishes to congratulate the Commission, and in particular its Special Rapporteur, who delivered a highly mature and scholarly draft, and the Chairman of the Drafting Committee, who conducted the work leading to the elaboration of the final version of the draft.

The Polish delegation accepts the general structure of the draft divided into four general parts dealing with the origin of State responsibility, obligations arising out of internationally wrongful acts, procedures of implementation of State responsibility and general provisions, respectively. The draft therefore preserves its general structure, as proposed at the very beginning of the ILC work on the topic. At the same time, thanks to important changes, modifications, clarifications, and simplifications, the current version constitutes an important step towards the possible codification of the law on State responsibility.

Final form of the draft articles

Poland

Although we are fully aware of possible difficulties, we would welcome the convening of an international convention under the auspices of the United Nations General Assembly codifying the law of State responsibility.

Part One
The internationally wrongful act of a State

Title

France*

Part One
Act <u>giving rise to the international responsibility</u> of a State

In the view of France, the title selected by the Commission is too general. It would be preferable to give this part the title "Act giving rise to the international responsibility of a State", which would be more in keeping with the content of chapters II and III concerning what constitutes an act giving rise to responsibility, namely, conduct attributable to a State which is wrongful under international law.

* Proposed additions or amendments are indicated by underscoring and bold type. Proposed deletions are indicated by a strike mark and bold type.

Chapter I
General principles

Article 2
Elements of an internationally wrongful act of a State

Poland

(*See article 13*)

Chapter II
The act of the State under international law

Article 4
Attribution to the State of the conduct of its organs

Poland

As the ILC has adopted the objective concept of an international delict, we endorse the opinion expressed by the Special Rapporteur that the definition of the State organ under article 4 of the draft is of crucial importance for the attribution of the wrongful act to the State. However, we do not share the position according to which the evaluation of the possible position of a specific agency within the State system should be subjected to control under international law. The issue should be governed exclusively by the domestic (constitutional) law of the State concerned.

Article 6
Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

Poland

(*See article 17*)

Chapter III
Breach of an international obligation

Article 12
Existence of a breach of an international obligation

Poland

(*See article 13*)

Article 13
International obligation in force for the State

Poland

We understand that article 13 of the draft is of inter-temporal nature and that its aim is to exclude the retroactive application of the law of State responsibility. Otherwise this provision in connection with the definition of the internationally wrongful act as formulated in article 2 (b) of the draft, as well as with article 12, would be superfluous.

Chapter IV
Responsibility of a State in respect of the act of another State

Title

France

Chapter IV
Responsibility of a State <u>as a result of</u> the act of another State

It would be preferable to modify the title of Chapter IV, at least in the French version, so as to refer to the responsibility of a State "as a result of" and not "in respect of" the act of another State.

Article 16
Aid or assistance in the commission of an internationally wrongful act

Poland

The wording of article 16 is unclear. Should it be interpreted as imposing the international responsibility upon the State assisting exclusively if that State is bound by the specific international obligation infringed by the State assisted, or does the provision in question refer to the rules of attribution of the internationally wrongful act?

Article 17
Direction and control exercised over the commission of an internationally wrongful act

Poland

We are not convinced that the criteria formulated in draft article 17 for the responsibility of the State directing or coercing another State to commit the

internationally wrongful act should be directly applied to situations covered by article 6, as the former cases seem to be extremely rare under international law, and should be interpreted extremely restrictively. Article 6 should therefore be read as an alternative, in accordance with its wording, while the conditions of responsibility under article 17 should be fulfilled jointly.

Article 19
Effect of this Chapter

Poland

Article 19 concerns the issue of the responsibility of the State committing a violation of international law under coercion. Although this problem should be evaluated from the point of view of the draft as a whole, it might be useful to introduce the exception of coercion into chapter V as an additional circumstance excluding wrongfulness. Any consequence of such acts would nevertheless be covered by draft article 27.

Chapter V
Circumstances precluding wrongfulness

France

It would be more satisfactory, given the general purpose of the draft articles, for this chapter to address "circumstances precluding responsibility" rather than "circumstances precluding wrongfulness", a question whose scope appears to go far beyond the topic of the law of responsibility.

If the absence of wrongfulness by definition precludes responsibility as conceived in article 1, it is not impossible to maintain that, on the contrary, there are circumstances in which responsibility is precluded even in the case of a wrongful act.

From this standpoint, there would be no reason to include in this chapter "consent", "compliance with peremptory norms", "self-defence" and "countermeasures in respect of an internationally wrongful act". On the other hand, it would be possible to retain the articles on "force majeure", "distress" and "state of necessity", considering that they have to do with circumstances precluding responsibility even in the case of a wrongful act.

However, the distinction between these two categories of circumstances is open to controversy with regard to both its principle and its precise content. France, mindful of the difficulties which this question raises, does not, therefore, propose to modify chapter V with the exception of deleting its final article (see below).

Article 26
State of necessity

Paragraph 1

France

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community **of States** as a whole.

In its written and oral comments France has several times had occasion to express its reservations about the phrase "the international community as a whole". Each time this expression is used in the draft articles, it would be preferable to replace it by the one contained in article 53 of the 1969 Convention on the Law of Treaties, i.e., "the international community of States as a whole".

Poland

The notion of an "essential interest" as formulated in article 26 is not precise and should be clarified in the commentary of the ILC.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

France

Delete the article.

Subparagraph (a) of this article states an obvious truth that does not need to be repeated. Subparagraph (b) is ambiguous: it could imply that the State to which the act giving rise to responsibility is attributable has an obligation to provide compensation for damage *even if* the act is not wrongful. The statement is unacceptable when set forth in such a general and imprecise way; for that reason, it is proposed that the article as a whole be deleted.

Part Two
Content of international responsibility of a State

Chapter I
General principles

Article 31
Reparation

Poland

Article 31 should be amended (perhaps by way of a reference to other provisions of the draft dealing with the presenting of international claims by directly and/or indirectly injured States) in order to limit a possibility of bringing financial claims in cases of moral injuries. We are not convinced that a possibility of claiming compensation for moral injury, as envisaged in article 31 (2) read jointly with articles 37 and 38, reflects the current state of international law. In our opinion, the moral damage gives right to satisfaction only and excludes compensation, even though under certain circumstances moral damages can also be materially assessable. The provision is connected with article 40 which states that the reparation should be established by taking into account the contribution to damage by the injured State. Should this be understood as indicating that the damage constitutes an element of the internationally wrongful act?

Article 32
Irrelevance of internal law

France

Article 57 ~~32~~ [42]
Irrelevance of internal law

The responsible State may not avail itself of the provisions of its internal law to justify a breach of its international obligations

It is not essential to recall the customary principle codified in article 27 of the 1969 Convention on the Law of Treaties, which has a general impact on international law. Nevertheless, the scope of application of this principle should not be limited to Part Two of the draft articles. If this article is retained, it should be moved, possibly to Part Four (General provisions), so that it concerns the draft articles as a whole.

A better place for former article 32 would be in Part Four, for the reasons given above.

Poland

Article 32 dealing with the irrelevance of internal law is of great importance not only for the implementation of responsibility but also with respect to other aspects of the law on State responsibility, including, e.g., the origin of State responsibility (see article 4). We understand this provision as relying upon domestic provisions in order to exclude the possibility of making claims under the domestic legal system. We would suggest including this provision in Part Four of the draft. Probably the same may be true with regard to article 33, which covers in fact the same question as the general clause of article 56 (as it allows the reference to other rules of international law applicable to the specific situation). Reference may be made to the example of article 60 of the Vienna Convention on the Law of Treaties, as well as some other multilateral international conventions or so-called self-contained regimes.

Article 33
Other consequences of an internationally wrongful act

Poland

(*See article 32*)

Article 34
Scope of international obligations covered by this Part

Paragraph 1

France

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community **of States** as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.

Paragraph 2

Poland

Although we are ready to accept the draft provisions referring to the position of individuals under the law of State responsibility, we are not fully convinced that they do not exceed the current state of international law. In particular, the meaning of article 34 (1.2) is unclear as to the relationship between the law on State responsibility and claims based upon private law presented by the municipal law of the perpetrator.

Chapter II
The forms of reparation

Article 36
Restitution

France

(c) Would not necessarily cause that State to violate another international obligation.

It is necessary to add a third item to article 36 (or 35 in the text proposed by France), setting forth the principle that the State responsible for the internationally wrongful act must make restitution only if doing so does not require it to violate any of its other international obligations, and thus to commit another internationally wrongful act. Otherwise, the situation of a State bound (even if by its own act) by two obligations whose simultaneous performance is impossible because they are mutually incompatible would be legally irresolvable. It is not possible to establish a rule whose application would result in there being no concrete solution to one or more disputes.

Poland

As to restitution, we suggest amending article 36 by inserting in the chapeau the expression "to re-establish the situation which would have existed if the internationally wrongful act would have not been committed" in place of the current corresponding expression. In our opinion, such a formula does not necessarily imply full reparation. We are of the opinion that full reparation might be excluded in case of material [financial] reparation if such a reparation would lead to an excessive burden for the responsible State. It seems to us therefore that the provision of article 36 (b) should be extended to cover also reparation within the meaning of article 37 (e.g., in the form of a general provision for the chapter concerned).

Article 40
Contribution to the damage

Poland

(*See article 31*)

Chapter III
Serious breaches of essential obligations to the international community

France

In the view of France, chapter III could be deleted. Article 41 is not essential. It seems to constitute no more than an introduction to some provisions of Part Two bis (which France proposes to convert to Part Three). Nevertheless, the qualification in paragraph 1 concerning an internationally wrongful act could be restated in article 49 (or article 46 in the text proposed by France). Here, too, the expression "international community as a whole" should be replaced by "international community of States as a whole".

As the representative of France explained in his statement to the Sixth Committee on 24 October 2000, article 42 raises a number of difficulties. Paragraph 1 introduces the concept of "punitive" damages linked to a "retaliatory" approach which is not, on the whole, the one taken in the draft articles as provisionally adopted on second reading, and which does not, in France's view, appear to rest on solid legal foundations, for reasons which France has already had occasion to explain.

As to paragraphs 2 and 3, they do not appear to be essential, for they add nothing of substance.

In sum, nothing seems to justify retaining chapter III, especially in this location.

Poland

The Government of Poland accepts the inclusion of the provisions on serious breaches of essential obligations owed to the international community as a whole. Article 41 (1) combines the institutions of jus cogens and obligations erga omnes, the former being of substantive, and the latter of procedural nature. We must emphasize, however, that the criteria for the evaluation of whether the breach in question is really serious are not objective and can create important difficulties in practice. Furthermore, the provision referred to is not correctly reflected in Part Two bis of the draft articles. In particular, it is unclear whether reparation claims in case of obligations erga omnes can be presented by every State, all States acting together, or by the international community as a whole. In our opinion, it should be stated clearly (either in article 49 or in chapter II of the draft) what kind of claims could be presented by the States not individually affected by the violation of international law, as the legal interest affected by such violation is of a different nature and focuses on the observance of international law by all the parties to the specific international legal relationship. We agree that it would be difficult to achieve a general consensus on this point, but the ILC should clarify the issue in its commentary.

Article 41
Application of this Chapter

France

Delete the article.

Article 42
Consequences of serious breaches of obligations to the international community as a whole

France

Delete the article.

Part Two bis
The implementation of State responsibility

Title

France

~~**Part Two bis**~~ **Part Three**
The implementation of international State responsibility

France suggests that this part become Part Three of the draft articles and that the inclusion of a part dealing with the settlement of disputes be abandoned.

Chapter I
Invocation of the State responsibility of a State

Article 43
The injured State

France

Article 40 ~~43~~ [40]
The injured State

Under the present draft articles, a State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, ~~**or the international community as a whole**~~, and the breach of the obligation:

(i) Specifically affects that State: or

(ii) Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned., **or**

(c) A group of States including that State or the international community of States as a whole, and if the obligation is established for the protection of a collective interest.

In the view of France, and as its representative stated to the Sixth Committee on 24 October 2000, it would be useful to make a clearer distinction between the injured State and the State which only has a legal interest. To that end, it would be preferable to place article 49, paragraph 1 (a), after article 43 (a) and (b) (or article 40 (a) and (b) in the text proposed by France). It would indeed seem that the breach of an obligation which protects a collective interest injures each of the States included in the group of States for whose benefit the obligation was established, so that each of them has more than a mere legal interest in ensuring that the obligation is carried out.

Article 45
Admissibility of claims

France

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to ~~**the nationality of claims**~~ **nationality in the context of the exercise of diplomatic protection**;

In the French version, this correction is essential for the clarity of the text, since the expression *"nationalité des réclamations"* (nationality of claims) has no precise meaning. The rules relating to nationality that are referred to here are those which are applicable in the context of the exercise of diplomatic protection.

Article 49
Invocation of responsibility by States other than the injured State

France

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State **if that State has committed an internationally wrongful act which constitutes a serious breach of an obligation owed to the international community of States as a whole and which is essential for the protection of its fundamental interests**[1]

Para. 1, chapeau: France proposes that the description of an internationally wrongful act contained in current article 41 be used here and that article 41 be deleted, as suggested.

~~(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;~~

~~(b) The obligation breached is owed to the international community as a whole.~~

2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:

~~(a)~~ Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 29 ~~30~~ [41, ~~46~~];

~~(b) Compliance with the obligation of reparation under Chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached~~

3. The requirements for the invocation of responsibility by an injured State under articles 41 ~~44~~, 42 ~~45~~ [22] and 43 ~~46~~ apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Chapter II
Countermeasures

Poland

We welcome the inclusion of provisions on countermeasures in the draft articles. However, we would like to propose two minor amendments.

(*See also articles 53 and 54*)

Article 51
Obligations not subject to countermeasures

Poland

It is not quite clear whether in the light of article 51 (2) and article 53 (3) the injured State can refer to countermeasures without exhausting any measures of peaceful settlement of disputes. The Government of Poland suggests that

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Para. 1 (a): As explained above, this provision could become article 43 (c) (or article 40 (c) in the text proposed by France).

Para. 2 (b): On several occasions, France has defended the idea that what should distinguish the injured State from the State having a legal interest is the fulfilment of the obligation of reparation. The State which has only a legal interest can only demand the cessation of the breach committed by another State. It cannot seek reparation for the damage caused by an internationally wrongful act which has not directly affected it, nor is there any reason for it to substitute itself for the injured State in demanding the reparations owed to that State. Unlike the injured State which can, by invoking the responsibility of the State which has committed the internationally wrongful act, seek reparation for the damage it has suffered, a State which has a legal interest, can only demand the cessation of the internationally wrongful act when invoking the responsibility of the State which has violated the obligation. For this reason, in the view of France, article 49, paragraph 2 (b) (or article 46, paragraph 2 (b), in the text proposed by France), should be deleted. Only subparagraph (a), which establishes the principle that a State having a legal interest can demand the cessation of an internationally wrongful act, should be retained.

countermeasures can be used after a prior reference to the procedures in force in accordance with all the relevant rules of international law in force between the States concerned (and not only to negotiations, as mentioned in article 53 (2)).

Article 53
Conditions relating to resort to countermeasures

Paragraphs 4 and 5

France

4. Countermeasures other than those in paragraph 3 may not be taken:

(a) While the negotiations are being pursued in good faith and have not been unduly delayed;

(b) When the dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties.

5. Countermeasures may not be taken, and if already taken must be suspended within a reasonable time if **the internationally wrongful act has ceased**~~:~~.

~~**(a) The internationally wrongful act has ceased; and**~~

~~**(b) The dispute is submitted to a court or tribunal which has the authority to make decisions binding on the parties.**~~

It is proposed here to move subparagraph (b) of paragraph 5 to paragraph 4. It is unwarranted for the initiation of a court settlement procedure to have the effect, in and of itself, of preventing the parties from taking or maintaining any countermeasures. Even in such an eventuality, it is appropriate to reserve for a State the right to take or maintain the provisional countermeasures referred to in paragraph 3.

Paragraph 5

Poland

We do not think that both premises excluding the use of countermeasures provided for in article 53 (1.5) should be fulfilled jointly; the word "and" should be replaced by the word "or". Such a provision would logically amend paragraph 4 of the same provision.

(*See also article 51*)

Article 54
Countermeasures by States other than the injured State

France

1. Any State entitled under article 46 ~~49~~, paragraph 1, to invoke the responsibility of a State may take countermeasures ~~at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this Chapter.~~

~~2. In the cases referred to in article 41, any State may take countermeasures~~, in accordance with the present Chapter, in the interest of the beneficiaries of the obligation breached.

2~~3~~. Where more than one State takes countermeasures under the present article, the States concerned shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled.

It seems neither appropriate nor logical to subordinate the right of a State having a legal interest as defined in article 46, paragraph 1, to take countermeasures to the demand of an injured State, since the legal interest should be defined more strictly than is the case in article 49 of the current draft.

Paragraph 2

Poland

We have important doubts as to the formula used in article 54 (2). According to article 59, the obligations arising out of the (draft) articles on State responsibility are without prejudice to the Charter of the United Nations (i.e., primarily Article 2, paragraph 4, and Chapter VII of the Charter). This means that the Security Council should enjoy the monopoly of deciding on possible countermeasures (sanctions). However, the situation is less clear when the Security Council is unable to decide upon taking any action in case of danger to or violation of international peace and security, to say nothing of the situations in which any permanent member of the Security Council uses the right of veto with respect to proposed action by the Council. Finally, we can imagine cases of serious breaches of international law governed by article 41 of the draft which are outside the competence of the Security Council. Article 54 (2) suggests that in such cases every State individually could have recourse to countermeasures in order to force the perpetrator to comply with the alleged obligations deriving from the responsibility of States and the only duty would be to consult the decision to take countermeasures with other States applying countermeasures (including consultation within international organizations). Although there is a certain trend in contemporary international law in this direction (e.g., the reaction by certain States in respect of violations of the conditions of the settlement of the conflict between Iraq and Kuwait), it seems that this practice has met important opposition within the international community. It should nevertheless be subjected to some forms of control by the international community, as different opinions may arise as to the legality of action under specific circumstances (we may cite here the example of the right to self-determination, the implementation of which depends upon the recognition of the people so entitled by the international

community). Finally, we understand that countermeasures by third (indirectly injured) States should be directed mostly at the cessation of the wrongful act rather than at obtaining reparation by the directly injured State, which reflects existing customary law in this field.

Part Four
General provisions

Article 57
Responsibility of or for the conduct of an international organization

France

These articles are without prejudice to any question that may arise in regard to the responsibility under international law of an international organization or of any State **as a result of** the conduct of an international organization.

The expression "as a result of" better renders causality.

Article 58
Individual responsibility

Poland

We welcome article 58 of the draft dealing with the possible criminal responsibility of individuals and express our intention and readiness to bear all responsibilities arising out of the Statute of the International Criminal Court.